United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2447

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2447

UNITED STATES OF AMERICA,

Appellee,

—v.—

CATHERINE BRIGHT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

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Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc*, of the decision by a panel of this Court (Moore, Mansfield and Gurfein, *C.JJ.*), filed May 21, 1975, reversing the conviction of Catherine Bright for possession of stolen mail, 18 U.S.C. § 1708, and remanding for a new trial.

Reasons for This Petition

The Court reversed the conviction because "the District Court erred in charging the jury on the element of knowledge required under 18 U.S.C. § 1708" slip op. at 3630. The Government respectfully submits that the grounds stated for reversal are without foundation and contrary to clear

precedents of this Court announced both before and after the holding in this case.

Although this is an appeal following conviction at a two-day trial for a crime which is hardly heinous, the issue involved has crucial significance in any criminal case in which knowledge of a fact is an essential element of the crime. District Judges in this Circuit must have a uniform standard under which to instruct juries on the element of knowledge where "reckless disregard for the truth" becomes an issue. Not only does the Court's opinion in *Bright* create confusion by enunciating a requirement in instructions on knowledge never previously found warranted, the requirement announced is wholly unnecessary, misleading and without any authority to support it.

ARGUMENT

The District Court's charge on the element of knowledge was correct.

At the trial below Bright was tried on nine counts charging her with possession of stolen mail, specifically, stolen welfare checks; the jury convicted her on three of the counts. It was undisputed at trial that on various dates in 1972 Bright possessed the nine welfare checks alleged in the indictment and that the checks had been stolen from the mail. In her testimony Bright admitted that she had possessed the checks but claimed that she had not known that the checks were solen and had cashed them for a "hustler" named Freddie Scott (Tr. 130, 169). Bright claimed that Scott had told her that he had received the checks for rent from an apartment he had sublet from a friend or in payment of a debt. (Tr. 123, 128, 130). After one of the checks was returned to the bank unpaid and debited against her account, she confronted Scott, who explained that there must have been a mixup. (Tr. 130, 133). Thereafter she

cashed three more checks for him, those which were the subjects of Counts Six, Seven and Twelve, on which Bright was convicted. (Tr. 133, 134).

The only issue at the trial below was thus whether Bright knew the checks were stolen. Judge Motley began her instruction on this element of the offense:

> "Before you can find the defendant guilty, as I said, you must find beyond a reasonable doubt that she knew the checks were stolen at the time she possessed the checks. If you find that the defendant did not know the checks were stolen, then of course you must acquit the defendant, find the defendant not guilty." (Tr. 258).

After charging on the inference from recent possession of stolen property the trial judge then instructed:

> "You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen but with a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks." (Tr. 260).

Thereafter, during deliberations, the jury requested, and Judge Motley repeated, the charge on the elements of the crime. (Tr. 267-269). Still later the jury sent in a second note requesting a further instruction on reckless disregard, and the Judge responded:

> "You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard to whether the checks were stolen or were [sic] conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks." (Tr. 277)

On appeal, this Court found these instructions inadequate. Relying on *United States* v. *Jacobs*, 475 F.2d 270, 287 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973), and *United States* v. *Brawer*, 482 F.2d 117, 128 (2d Cir. 1973), the Court held that the trial judge should have "balanced" the "reckless disregard" charge given with language adapted from the ALI Model Penal Code § 2.02(7)*—"unless the defendant actually believed the [checks] were not stolen" slip op. at 3633. The opinion states, slip op. at 3631, 3634:

> "To put it somewhat differently, it is common ground that negligence alone will not suffice. Nor will a reckless disregard of whether the bills [sic] were stolen, standing by itself. Such reckless disregard must be coupled with a conscious purpose to avoid learning the truth. And even if these two tests are in conjunction the jury should still be advised that if they, nonetheless, fail to find that the defendant actually believed that the property was stolen, they should acquit.
>
> * * * * *
>
> "Thus, at the crucial stage with the single element at issue, the defendant's 'knowledge' that the checks were stolen, the instruction given was insufficient to give the jury the proper balance required. It failed to give 'clarification' to the term 'reckless disregard.' If concluded with the statement in the disjunctive that either 'reckless disregard' or a conscious effort to avoid learning the truth would be enough.
>
> "We assume that the use of the disjunctive 'or' standing by itself would not require us to reverse. See *United States* v. *Sarantos*, 455 F.2d 877, 881-82

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* "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

> (2d Cir. 1972).[2] But we cannot escape the feeling that the lack of juxtaposition of the choices available in a balanced way was fatally erroneous, especially in the light of counsel's acute objections on the very point. That is not to say that a balanced result can only be achieved by the use of particular words and phrases and, of course, generally a charge must be read as a whole."

We respectfully submit that in reversing the conviction on this ground this Court ignored the settled doctrine to the contrary in this Circuit and misinterpreted those decisions which it read as supporting the result reached. It also engrafted onto the traditional "reckless disregard" charge in this Circuit balancing language from the Model Penal Code which is both misleading and wholly unnecessary when transplanted from the context in which it is found to the customary "reckless disregard" instructions.

First, while seemingly abjuring any intention to do so, the Court has either overruled or completely disregarded *United States* v. *Sarantos, supra,* in which the issue of knowledge was as vital as in this case and in which convictions were sustained despite the following instruction, identical to Judge Motley's below, on reckless disregard, to which vigorous and timely objection was made by the defense:

> "With respect, however, to the requirement, which I just gave you, that Mr. Sarantos know that the statements were false, if you find that Mr. Sarantos acted with reckless disregard of whether the statements made were true or with a conscious effort to avoid learning the truth, this requirement is satisfied,

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[2] The court there said: "We do, however, urge the use of 'and' rather than 'or' in future charges on this issue.' 455 F.2d at 882."

> even though you may find that he was not specifically aware of the facts which would establish the falsity of the statements." 455 F.2d at 877.

While this Court, on appeal in *Sarantos*, cautioned that it would have been preferable to link the "reckless disregard" and "conscious purpose" language with "and" instead of "or", as Judge Wyatt had done in reliance on *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971),* the Court found the instruction to be harmless error, if error at all, holding that the two concepts "mean essentially the same thing." 455 F.2d at 882. The circumstances in *Bright* warrant, if anything, *a fortiori* affirmance, since the defect identified in *Sarantos* was there in the Judge's main—and only charge—on knowledge, while here the offending word "or" appeared only in a supplemental instruction. It is a commonplace that the instructions to the jury should be read as a whole, *United States* v. *Park*, — U.S. —, 43 U.S.L.W. 4687, 4692-4693 (June 9, 1975), *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974), and, even without the guidance of *Sarantos*, it is plain Judge Motley's lapse in the supplemental charge is not the stuff of which reversible error is made. *See, e.g.*, *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974).

Of course, the Court in *Bright* was explicit that its condemnation of the charge given here went beyond the use of "or" instead of "and", holding rather that the charge was not fairly balanced without language that the defendant could not be convicted if she "actually believed the checks

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* In *United States* v. *Thomas*, 484 F.2d 909, 912-914 (6th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974), the Court of Appeals rejected as "without substantial merit" a claim based on the use of "or" instead of "and". While relying heavily on *Sarantos*, the Court in *Thomas* did not adopt the suggestion in *Sarantos* that the "and" formulation was preferable.

were not stolen." A fair reading of *Sarantos,* in which a precise request for language of that sort was not presented, establishes without much doubt that the Court believed the charge there given to be a fair and balanced one without the "actual belief" language now held a prerequisite, particularly since, in discussing the charge, the *Sarantos* court specifically discussed and quoted the section of the Model Penal Code containing that language. 455 F.2d at 881 n.4. That the Court in *Sarantos* should have thought the charge in that case a proper one is hardly surprising, since it originated in authority in this Circuit as venerable as *Bentel* v. *United States,* 13 F.2d 327 (2d Cir.), *cert. denied,* 273 U.S. 713 (1926),* and has, without the inclusion of the language now said to be indispensable, been upheld as an accurate statement of the law and a proper charge to the jury in various formulations, including the one used below, in numerous cases in this Court. *E.g., United States* v. *Ottley,* 509 F.2d 667, 672 (2d Cir. 1975); *United States* v. *Frank,* 494 F.2d 145, 152-153 (2d Cir.), *cert. denied,* 419 U.S. 828 (1974); *United States* v. *Gottlieb,* 493 F.2d 987, 994-995 (2d Cir. 1974); *United States* v. *Joly,* 493 F.2d 672, 674-675 n.4 (2d Cir. 1974); *United States* v. *Egenberg, supra; United States* v. *Abrams, supra,* 427 F.2d at 91, *cert. denied,*

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* *Bentel* is apparently the source in this Circuit for the rule that an inference of guilty knowledge is properly drawn when a false statement is made with reckless disregard for its truth. That concept was by no means novel when announced in *Bentel, cf. Cooper* v. *Schlesinger,* 111 U.S. 148, 152 (1884), and a finding of reckless disregard alone has been held sufficient, on the authority of *Bentel,* to support a conclusion of guilty knowledge in cases as recent as *United States* v. *Benjamin,* 328 F.2d 854, 862-863 (2d Cir.), *cert. denied,* 377 U.S. 953 (1964), and *United States* v. *Egenberg, supra,* the latter relying on *United States* v. *Abrams,* 427 F.2d 86, 91 (2d Cir.), *cert. denied,* 400 U.S. 832 (1970), which in turn relies on *Bentel.* Thus, despite the Court's unexplained preference in *Sarantos* for the "and" formulation of the "reckless disregard"—"conscious purpose" instruction, it is hardly settled, as the Court in *Bright* suggests, slip op. at 3631, that "reckless disregard . . . standing by itself" is an insufficient basis upon which a jury may find guilty knowledge.

400 U.S. 832 (1970); *United States* v. *Benjamin, supra,* 328 F.2d at 862-863.* See generally *United States* v. *Thomas, supra; United States* v. *Finnerty,* 470 F.2d 78, 80 (3d Cir. 1972); *United States* v. *Henderson,* 446 F.2d 960, 966 (5th Cir.), *cert. denied,* 404 U.S. 991 (1971). Indeed, two weeks after the filing of the opinion in *Bright*, this Court in *United States* v. *Dozier,* Dkt. No. 74-2594 (2d Cir., June 10, 1975), again upheld a "reckless disregard" charge without the balancing language held necessary in this case.**

Indeed, recent decisions of this Circuit imply strongly that the use of "actual belief" language is of little importance to a fair and balanced charge on knowledge in its traditional "reckless disregard" form. In *United States* v. *Olivares-Vega,* 495 F.2d 827, 830 & n. 10, 11 (2d Cir. 1974), the Court held that the instruction on knowledge there was "[a]lmost exactly the same" as the "pertinent portions" of the knowledge charge in *United States* v. *Joly, supra.* Yet, the knowledge charge in *Olivares-Vega* did contain the "actual belief" language of the Model Penal Code but the "pertinent" portion of the charge in *Joly* does not.***

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* In *United States* v. *Squires,* 440 F.2d 859, 864 (2d Cir. 1971), this Court suggested that a knowledge charge in a case brought under 18 U.S.C. § 922(a)(6) should use the "high probability" language of the Model Penal Code. Significantly, the instruction the Court proposed, while formulated in terms of "high probability", did not include the balancing "actual belief" language.

** If you find from all the evidence beyond a reasonable doubt either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt. But it's up to you whether there is a reasonable doubt." *Id.*, slip op. at 4004.

*** Interestingly, in another portion of the charge in *Joly,* 493 F.2d at 674, Judge Weinstein did charge that the jury could find guilty knowledge if they concluded that "the defendant believed

[Footnote continued on following page]

In the second place, the two authorities relied on by the Court in this case to overthrow the settled law in this Circuit, *United States* v. *Jacobs, supra,* and *United States* v. *Brawer, supra,* provide no support whatsoever for the holding.

In *Jacobs* the District Court charged the jury in the language of both the standard "reckless disregard" instruction and the formulation of Section 2.02(7) of the Model Penal Code. This Court affirmed. While the opinion in *Bright* asserts that in *Jacobs* the affirmance of the ". . . conviction based on this charge [was] because it was a balanced charge which had not permitted the 'reckless disregard' portion of the charge to stand in isolation," slip op. at 3632, the contrary is the fact; the Court in *Jacobs* affirmed because the use of the "reckless disregard" language had neutralized the prejudice which might have come from the use of the Model Penal Code formulation "in isolation." Thus, after noting that the Model Penal Code formulation had been approved in cases in which it had *not* been used as part of the judge's charge, Chief Judge Friendly continued, 475 F.2d at 287-288:

> "But a good definition, like the language of a sound judicial opinion, see *Lisansky* v. *United States,* 31 F.2d 846, 852 (4 Cir.) (Parker, *J.*), *cert. denied,* 279 U.S. 873, 49 S.Ct. 514, 73 L.Ed. 1008 (1929) is not necessarily appropriate as a charge, and we can think of cases where sole reliance on the ALI lan-

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that he had cocaine and deliberately and consciously tried to avoid learning that there was cocaine in the package. . ." This curious inversion of the Model Penal Code formulation does properly put the emphasis on knowledge, rather than belief, in contrast to the portion of the Model Penal Code formulation held necessary here. As earlier noted, Judge Motley was at pains to emphasize that Bright should be acquitted if the jury found that she did not *know* the checks were stolen.

guage might be improper. The comments to the section (Tent. Draft No. 4, 1955) state that the provision was drafted to reach situations where the actor consciously shut his eyes to avoid knowing whether or not he is committing unlawful acts, *cf. United States* v. *Benjamin,* 328 F.2d 854, 862-863 (2d Cir.), *cert. denied,* 377 U.S. 953, 84 S.Ct. 1631, 12 L.Ed. 2d 497 (1964), and language of this sort would often be more useful to a jury than the 'high probability . . . unless he actually believed' formulation. But here the judge did not simply charge the Model Penal Code definition. He carefully explicated that although 'it is not necessary that the Government prove to a certainty that a defendant knew the bills were stolen,' on the other hand '[g]uilty knowledge cannot be established by merely demonstrating negligence or even foolishness on the part of a defendant.' And he emphasized the elements of the deliberate closing of the eyes to what would otherwise have been obvious and 'reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth. . . .'

* * * * *

"The jurors in this case were made well aware that they had to find either that the defendants actually knew the bills had been stolen or had manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe to be the fact."

The Court in *Bright* similarly misread *United States* v. *Brawer,* 482 F.2d 117 (2d Cir. 1973), a case in which the trial court had, as in *Jacobs,* given a hybrid "reckless disregard"—Model Penal Code instruction on knowledge. This Court affirmed, but hardly for reasons that support the result in *Bright*:

"For the reasons we gave in *Jacobs, supra,* we hold that the lower court's charge on knowledge is not defective under *Fields.* As in *Jacobs,* the court here was careful not to rely entirely on the American Law Institute definition which, we agree, could cause problems in other situations; a careful reading of the entire charge shows that the court emphasized the element of a defendant's 'deliberately clos[ing] his eyes to what otherwise would have been obvious to him'; the jury could infer guilty knowledge if it found 'from all the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid learning the source of the Treasury bills'; and that 'a defendant's knowledge of a fact may be inferred from wilful blindness to the existence of the fact.' (Tr. at 1075-76). The charge thus differs significantly from that found defective in *Fields* since unlike the situation in *Fields,* the jurors here were made aware that they had to find either that defendants actually knew the Bills had been stolen or that defendants by their conduct demonstrated that they had deliberately shut their eyes to what they had ample reason to believe was the truth. *United States* v. *Jacobs, supra,* 475 F.2d at 288." 482 F.2d at 128-129.

Thus both *Jacobs* and *Brawer,* relied on by this Court in *Bright,* not only do not support the result reached here but fully support the Government's view that the charge below was entirely fair. There is not the faintest whisper in either decision that any of the language of the Model Penal Code used was necessary—in whole or in part—to balance what would otherwise have been an unfair "reckless disregard" instruction.

The final point is, of course, that quite apart from the lack of precedent to support its view, the Court has found error in the omission of language which is wholly unneces-

sary to a balanced and fair charge. The "reckless disregard" instruction is a fair one in its usual form because it focuses specifically and subjectively on whether the defendant has a culpable state of mind. The charge in its traditional formulation can hardly be said to permit the conviction of a defendant who lacks guilty knowledge through other than a conscious design to avoid it. In this case particularly such discrimination was clear from the jury's verdict, which found guilty knowledge only with regard to checks possessed after one from the same source had been returned to the defendant unpaid.

The Model Penal Code provision, while designed to describe precisely the same state of mind as the "reckless disregard" charge, Model Penal Code Tent. Draft. No. 4, Comments on Section 2.02(7) at 129-130 (1955), is quite different in its approval and formulation. It is a definition comprised of two sharply contrasting elements, rather than of two that "mean essentially the same thing." *United States* v. *Sarantos, supra,* 455 F.2d at 882. The first branch of the instruction—"aware of a high probability"—focuses not on the defendant's subjective state of mind and conduct but on a relative and objective standard for evaluating analytically the reasonable inferences to be drawn from the facts of which the defendant is on notice. Given this objective and extremely low threshold for culpability, it is clearly necessary that a proper balance be struck by taking into account—in the second branch of the Model Penal Code formulation—the defendant's subjective state of mind, in short his "actual belief." However, the dangers of conviction without a subjectively culpable state of mind under the first branch of the Model Penal Code formulation absent the balancing "actual belief" proviso are simply not presented by the traditional "reckless disregard" instruction. The need for the "actual belief" balancing language evaporates where the "aware of a high probability" language is not used.

Moreover, and perhaps crucially, the mixture of the "actual belief" element of the Model Penal Code formulation into the "reckless disregard" standard language carries with it a substantial likelihood that the jury will be hopelessly confused. This is because, as already noted, the Model Penal Code formulation and the "reckless disregard" instruction strive for equivalent results but use highly distinct and disparate analyses which proceed from different starting points and travel different paths. A sufficient example of the imponderable analytical difficulties—severe enough in the abstract and insoluble in a concrete case—caused by the instruction required in this case is the proper resolution when an "actual belief" is the product of "a conscious purpose to avoid learning the truth."

In sum, we respectfully suggest is that it is not error to give the "reckless disregard" charge as it has always been given—without engrafting the "actual belief" portion of the Model Penal Code formulation which was designed to balance quite a different sort of instruction. The needless requirement that the "actual belief" language be included in the customary "reckless disregard" charge is likely to confuse juries substantially and at best does no more than add unnecessarily to "[t]he so-called 'boiler plate' section of the charge [which] has been built up over the generations to a highly disproportionate size by adding the omissions held to have been error by appellate courts in their decisions over the years." *United States* v. *Aloi,* 511 F.2d 585, 595 (2d Cir. 1975).

CONCLUSION

The opinion of the Panel should be vacated, and the judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of July, 1975 he served 2 copies of the within ~~brief~~ petition for reconsideration by placing the same in a properly postpaid franked envelope addressed:

J. TRUMAN BIDWELL, ESQ.
30 Rockefeller Plaza
New York, NY 10020

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III
JOHN D. GORDAN III

Sworn to before me this

7th day of July, 1975

Walter S. Mack, Jr.
WALTER S. MACK, JR.
NOTARY PUBLIC, State of New York
No. 31-4512465
Qualified in New York County
Commission Expires March 30, 1977